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ELECTION COMMISSION INDIA

NOTIFICATION

New Delhi, the 10th February 1958

S.O. 35.—In continuation of the Election Commission's notification No. 82/C.S.(1)/478/67 dated 2nd Agrahayana, 1879 Saka/the 23rd November, 1957, published in the Gazette of India Extraordinary, Part II, Section 3 dated the 6th Agrahayana, 1879, Saka/27th November, 1957, under section 106 of the Representation of the People Act, 1951(43 of 1951), the Election Commission hereby publishes the Judgment of the High Court of Judicature at Bombay delivered by it on the 17th December, 1957, on the appeal filed before that Court by Shri Shridhar Mahadeo Joshi.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

Tuesday, the 17th day of December, 1957

APPEAL NO. 796 OF 1957 FROM ORIGINAL DECREE

(under the Representation of People Act LXIII of 1951)

Shridhar Mahadeo Joshi (Ori. Petitioner)—*Appellant.**Vs.*Rajbhoj Pandurang Nathoji, (Ori Respondent)—*Respondent.*

Claim Rs. 200 for Jurisdiction, Appeal under Section 116A of the Representation of the People Act, 1951 (Act No. 43 of 1951.)

The petitioner applied for a declaration that the election of the respondent to the Council of States was illegal and void and for recovering the cost of the petition.

The Election Petition No. C.S.(1) 478 of 1957 was decided by the District Judge Poona, Election Tribunal who dismissed it ordering parties to bear their respective costs.

The appeal has been instituted in the High Court from the decision of the lower Court. The grounds of objection to the decision appealed against are:—

1. That the judgment and order of the learned Election Tribunal and District Judge Mr V. A. Naik of Poona is contrary to law and is contrary to the evidence in the case.
2. That the judgment and order of the learned Election Tribunal is erroneous inasmuch as the relevant provisions of the constitution of India and/or of the Representation of People Act, 1951, are not correctly construed.

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3. That the learned Election Tribunal has erred in holding that no electoral college is necessary for the holding of the Election to the Council of States.

4. That the learned Election Tribunal has erred in law in holding that newly elected members of the Bombay Legislative Assembly were entitled to vote before making and subscribing an oath or affirmation according to the form set out for the purposes in the 3rd Schedule of the Constitution.

5. That the learned Election Tribunal ought to have held that the election of the respondent was void by reason there being not in existence any person who had taken oath as required by the Constitution to make him eligible for exercising his vote for the purpose of electing a representative of the State on the Council of State.

6. That it was erroneous to hold that it was not incumbent on the Election Commission to hold elections to the four vacancies on the same day and at the same time so as to comply with Article 80 of the Constitution of India.

7. That the learned Election Tribunal ought to have held that the period of 10 days given by the notification published in the Bombay Government Gazette of 6th April 1957 was inadequate to enable intending candidates to make their nominations.

8. That the learned Election Tribunal ought to have held that the election of the respondent was materially affected by the non-compliance of the provisions of the Constitution of India and/or of the Representation of the People Act, 1951 and/or the Rules and Order made thereunder.

9. That the provisions of Article 80(4) of the Constitution of India have been erroneously construed.

10. That the learned Election Tribunal ought to have held that eligibility to vote for the election of the Council of States arises only after a person who is eligible to a member of the Legislative Assembly of a State, before taking his seat makes and subscribes before the Governor or some person appointed by him in that behalf an oath or affirmation according to the form set out for the purpose in the 3rd Schedule of the Constitution, that the expression 'taking his seat' have been incorrectly interpreted, that provisions of Art. 80, Art. 188, Art. 189, and Art. 190 are incorrectly construed, that the true meaning and effect of Art. 193 of the Constitution is not appreciated.

10A. That it was erroneous to hold that no electoral college was necessary.

11. That the provisions of sub-clause 4 of the Article 80 have not been properly interpreted.

12. That it should have been seen that the Representative of the State shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of a single transferable vote.

13. That it should have been appreciated that only with elected members of the Legislative Assembly of the State form Electors; in other words, the Electoral College for purpose of electing representative of States to the Council of States.

14. That it should have been seen that a person who is elected, cannot assume membership of the House and cannot function as such until he has taken or subscribed an oath or affirmation as required by the Constitution.

15. That the true meaning and effect of the form No. 7 given in the 3rd Schedule of the Constitution have not been understood.

16. That the provisions of Article 117 have been incorrectly construed.

17. That it should have been held that the expression 'before taking his seat' was synonymous with 'the assumption of duties and functions' of a member of the Legislative Assembly. That the words 'about to enter' in the form No. 7 in the 3rd Schedule have not been given their true effect and construction.

18. That it should have been seen that even voting as a member of the Legislative Assembly of the State before complying with the requirements of Article 188 makes a member subject to penalty under Article 188.

19. That it should have been interpreted that Article 188 amounts to a prohibition of the physical act of setting in the House or vacating as a member before the oath or affirmation is taken.

20. That it was erroneous to hold that Sec. 73 of the Representation of the People Act could govern the peremptory and mandatory provisions of the Constitution.

21. That Sec. 73 only deals with the constitution of the House and has no relevance whatsoever on the question of admission of duties and functions of the members of the Legislative Assembly.

22. That without prejudice to the aforesaid contention, Sec. 73 of the Representation of People Act, is *ultra vires* the Constitution of India to the extent to which it goes contrary to the peremptory and mandatory provisions of the Constitution of India.

23. That the learned Tribunal erred in attempting to understand the 'mind of the Legislature' from marginal note or the heading.

24. That the construction given to the word "taking his seat" by the learned Election Tribunal is too narrow and is therefore contrary to the letter and spirit of the Constitution of India.

25. That inasmuch as voting as a member of the Legislative Assembly before taking an oath is made subject to penalty. Such voting cannot amount to legal act until the oath is taken and calling upon the members of the Legislative Assembly to oath unless the condition precedent of taking an oath is complied with is in contravention of the provisions of the Constitution of India.

26. That the provisions of Sec. 69(1) of the Representation of the People Act have been erroneously construed.

27. That provisions of clause 4 of Article 190 have been given an incorrect construction.

28. That in any case it is completely erroneous to hold that the right to choose representative to the Council of State is a fundamental right vested in the elected members as such elected members by clause 4 of Art. 80 of the Constitution of India.

29. That the learned Judge erred in holding that the exercise of such a right is in no way dependent upon the making or subscribing an oath or affirmation under Article 181 of the Constitution.

30. That the construction given to the Article is too narrow inasmuch as the learned Judge confines the operation of the Article 188 only to what takes place on the floor of the house, and to the conducting of business on the floor or the house.

31. That it was erroneous to hold that taking of oath is not a condition precedent for enabling elected member to take part to the election of the Council of State and that a member does not cease to be a member if the oath is not taken nor does failure to make oath render the seat vacant *ipso facto*. That the question of rendering his seat vacant does not arise because the seat is not filled up nor is membership assumed until the oath is taken.

32. That it was erroneous to hold that submission of nominations has nothing to do and need not await the constitution of the House or upon its first meeting. It is further erroneous to hold that nomination by any person and members of the Assembly do not play any part in the same.

33. That the mandatory provisions of Art. 80 have been contravened in as much although there was four vacancies the election to the four vacancies was held at different times on different dates. Such a mandatory provision was directly in contravention of the mandatory requirement of holding the elections on the basis of the system of proportional representation by means of a single transferable vote.

34. That Sec. 147 of the Representation of the People Act is erroneously understood and construed.

35. That it was further erroneous to hold that there was a distinction made between vacancies caused on a retirement of a certain member on the expiration of the term of office and vacancies caused by the seats becoming vacant or being declared vacant before the expiration of the term of office of a member for certain reasons.

36. That it is in contravention of the mandatory provision of Article 80 of the Constitution to hold that the system of proportional representation can be adopted only in respect of general election and not in respect of by-election.

37. That it should have been held that the requirements of Sections 30 and 31 of the Representation of People Act relating to the publication of the notification was not complied with.

38. That provisions of Sec. 100(1) (d) (iv) of the Representation of the People have been misconstrued.

39. That every election which is void must affect the result of the election of the returned candidate. This position in law has not been properly appreciated.

40. That the judgment and order of the learned Election Tribunal and District Judge, Poona, is otherwise illegal, contrary to the provisions of the Constitution of India and the Representation of the People Act and the Rules and Order made thereunder.

2. Government receipt regarding the deposit of Rs. 500 favour of the Secretary to the Election Commission as security for the costs of the appeal is enclosed herewith.

3. For the above grounds and such others as will be advanced at the time of hearing, the appellant submit that this appeal be admitted, the record and proceedings of election petition No. C.S.(1)/478 of 1957 in the Court of the Election Tribunal and District Judge of Poona be called for, and the judgement and order dated 4th October 1957 made by Shri V. A. Naik, District Judge of Poona be set aside and finally this appeal be allowed with costs throughout.

Coram:—CHAGALA, C. J. & TENDOLKAR, J.

For the reasons stated in the accompanying judgment the Court confirms the order passed by the Election Tribunal and dismisses the appeal with costs.

U. S. HATTANGADI,
Dy. Registrar.

APPEAL NO. 796 OF 1957 FROM ORIGINAL DECREE

(Under the Representation of People Act—LXIII of 1951)

Bill of costs in the High Court

Claim 200/-

	By the Appellant		By the Respondent	
	Rs.	n.P.	Rs.	n.P.
Stamp for Memorandum of Appeal	2	50		
Stamps for copies of Bill of costs and Judgment	3	00		
Stamp for Vakalatnama	3	00	3	00
Bhatta for Process	3	12		
Sectioner's Fee	31	36		
Advocates' Fee	45	00	45	00
Surcharge	11	25	11	25
Stamp for affidavit	1	00		
TOTAL .	100	23	59	95

Seal

(Sd.) V. S. HATTANGADI, Deputy Registrar.

The 17th December 1957.

APPEAL NO. 796 OF 1957 FROM ORIGINAL DECREE

(Under the Representation of People Act—LXIII of 1951)

Shridhar Mahadco Joshi (Original Petitioner)—*Appellant.*

Versus

Rajbhaj Pandurang Nathaji (Original Respondent)—*Respondent.*

Appeal against the decision of V. A. Naik, Esquire, Election Tribunal and District Judge at Poona in Election Petition No. C.S. (1)478 of 1957.

M/s. H. R. Gokhale & R. N. Karnik, Advocates for the Appellant.

M/s. S. S. More & R. W. Adik, Advocates for the Respondent.

Coram:—CHAGLA, C. J. AND TENDOLKAR, J.

17th December, 1957

ORAL JUDGMENT

(Per Chagla, C. J.)

This is an appeal against a decision of the Election Tribunal constituted by the District Judge of Poona, dismissing the election petition presented against the election of Mr. Rajbhoj Pandurang Nathaji to the Council of State. Dr. Ambedkar died in December 1956 and he was a member of the Council of State and his death caused a vacancy. In respect of this vacancy a by-election was held. A notification calling upon the members of the Assembly to elect a member dated 4th April 1957 was published in the Government Gazette on the 6th April 1957 and a notification dated the 6th April 1957 was published in the Government Gazette of the 11th April 1957 which set out the various dates necessary for the purpose of the election, and the material date with which we are concerned is the 16th April, 1957 which was the last date for making nominations. The only person nominated for this election was Rajbhoj. The result was that no election was held and he was declared elected, and it is his election that is being challenged by the petitioner Shridhar Mahadeo Joshi, who himself is a member of the Bombay Legislative Assembly.

The main points urged before the Election Tribunal by the petitioner were that the election was bad because the members of the Assembly who constituted the voters, although they had been elected, had not taken their oath of office, and it was contended that the members of the Legislative Assembly could not exercise any of their functions till they took the oath of office, and it was suggested that one of their functions was to elect a member of the Council of State and inasmuch as that function was exercised before the oath was taken, the election was bad. The second contention urged was that Article 80 of the Constitution required that representatives of each State in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote, and what was urged was that there were three other vacancies besides that of Dr. Ambedkar and it was incumbent upon the Election Commissioner to fix the same date and time for all these four by-elections, so that the provisions of Article 80 could be given effect to. It was finally contended that the time given for filing the nominations, *viz.*, five days from the publication of the notification of the 11th April 1957, was inadequate and prevented other persons from being candidates for this election. The learned District Judge, in a very able and careful judgment, has examined each one of these contentions and has come to the conclusion that they are untenable.

Before we examine these contentions ourselves, it is necessary to look at the relevant provision of the law to determine what is the scope of the election tribunal in election petitions that come up before it, and the section that we have to consider is section 100 of the Act. That section deals with the grounds for declaring an election to be void, and the first subsection deals with three cases which would render the election of the returned candidate void. These three cases are dealing with the disqualification of the candidate, corrupt practice committed by him, or where a nomination has been improperly rejected. Then we come to the fourth case and that is dealt with in clause (d), and clause (d) opens with the following words: "that the result of the election, in so far as it concerns a returned candidate, has been materially affected—" then four instances are given and if any of these four instances are established then the election of the returned candidate has to be declared void, and the instance with which we are concerned in this petition is—

"(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act",

because the whole of the case of the petition is that in this election there was non-compliance with the provisions of the Constitution and of the Representation of the People Act and of the rules made under that Act. But what is important to note is that the Legislature advisedly did not render an election void merely because there was non-compliance with the provisions of the Constitution or of the Act or of the rules and orders made under the Act. The Legislature required a further condition, and that was that the non-compliance should materially affect the result of the election as far as that result concerned the returned candidate. Therefore, not only has the petitioner to establish that there has been a non-compliance with the provisions of the Constitution or of the Act or of the rules made under the Act, but he has also got to establish that by reason of that non-compliance the result of the returned candidate has been materially affected. The learned Judge has found that in this particular case the result of the election was not materially affected, even assuming there was non-compliance. But really and logically, before we deal with some of the points urged by Mr. Gokhale and considered by the learned Judge, we have to be satisfied that the result

has been materially affected, because if the result has not been materially affected our view is to compliance or non-compliance with the provisions of the Constitution would be entirely academic.

Mr. Gokhale, confronted with this difficulty, urges upon us that such a view of this section may lead to serious consequences. What he says is that you may have a case where there is no election at all and yet only one person may be returned or elected by a so-called election, and it may be said that the result of that election has not been materially affected. But, says Mr. Gokhale, surely the Court will not uphold some procedure or some process which may go by the name of election but which may merely be a farce or a camouflage for election. Now, the answer to that difficulty is simple. It is only an election which has taken place that can be challenged by a petition under sections 80 and 81. If there is no election at all, whatever other relief the aggrieved party may have, it would not be the relief of filing a petition under sections 80 or 81. He may conceivably file an application for a writ of *quo warranto* under section 86, or he may file a declaratory suit. But when an aggrieved party files an election petition to set aside an election, we must assume that an election has taken place, and what has been complained of is what has taken place in the course of that election. Therefore, we must approach the petitioner's case on the basis that he is aggrieved by the fact that in the course of this election there has been a non-compliance with the provisions of the Constitution or of the Act or of the rules or orders made under the Act.

Now, looking to the contentions of the petitioner from that point of view, in our opinion, it is unnecessary to decide the first contention urged by the petitioner whether in the absence of an oath being administered to the members of the Assembly they were qualified voters for the seat in the Council of States which had been rendered vacant by the death of Dr. Ambedkar. Only Rajbhoj was nominated for this seat, there was no opposition and he was elected without a contest. The stage was never reached when any member of the Assembly was called upon to exercise his vote. The question may have assumed importance if there had been a contest and if members of the Assembly had cast their votes in favour of one or the other candidate. But it is difficult to understand how, assuming that the members of the Assembly had no right to vote till they had taken the oath, the result of the election of the respondent has been materially affected by non-compliance with this provision. In a sense, there has been no non-compliance at all, because the stage of non-compliance would only have reached if and when the members of the Assembly had attempted to exercise their right of franchise.

Mr. Gokhale says that the constituency did not exist till the members of the Assembly had taken their oath, and in the absence of any constituency there was no election at all. In our opinion, that contention is entirely untenable. The Election Commissioner had called upon the members of the Legislative Assembly, who had been elected, to elect a person to fill the vacancy caused by Dr. Ambedkar's death. That was the constituency to which this notification was addressed and which constituency was called upon to discharge its duty. The gravamen of the petitioner's challenge is not that the notification was addressed to wrong people or to a constituency which did not exist under the Constitution, but that this constituency had to wait till the stage of taking of the oath had reached before it could function as a constituency and exercise its franchise. But, as we have already said, that question is purely academic because it never became necessary for this constituency to exercise its franchise.

The next contention is about the question of proportional representation. The position under the Constitution is that under Article 80, which deals obviously with the general election, the members of the Legislative Assembly have to elect the quota given to them in the Council of States by the system of proportional representation by means of the single transferable vote, and what is urged by Mr. Gokhale is that by having a single by-election to fill Dr. Ambedkar's vacancy this system could not be resorted to and therefore many persons who might otherwise have been candidates did not think it worth their while to fight the election. It is suggested that with a single by-election the minorities had no hope against the majority party and no member of the minority party would think of fighting the election against a member of the majority party. There is some force in this argument and we might have been inclined to hold that this might materially affect the result of the election, provided it was incumbent upon the Election Commissioner to fill all the four vacancies by one by-election. But the position in law is clear and the provisions with regard to by-elections to Council of States are governed by section 147 of the Representation of the People Act, and it is incumbent upon the Election Commissioner to fill up a casual vacancy in the Council of States in the manner laid down in that section. Therefore, as soon as there was a casual vacancy caused by the death of Dr. Ambedkar, that casual vacancy had to be filled up in the manner laid down in that section. It was a coincidence that subsequent to Dr. Ambedkar's death there were three other casual vacancies and each one of these vacancies had also to be filled up in the manner laid down in section 147. But there is no provision in law that if there are four casual vacancies to be filled up, they must be filled up by a single by-election, and in the absence of any such provision we cannot accede to the contention of the petitioner that it was incumbent upon the Election Commissioner to fill these four vacancies by one by-election.

Now, we see no difficulty with regard to complying with the provision that election to the Council of States should be by a system of proportional representation by means of the single transferable vote. Section 147 itself provides that the provisions of the Act and the rules and orders made thereunder shall apply, as far as may be, in relation to the election of a member to fill such vacancy. Therefore, as far as possible, a by-election should be approximated to a general election, and if it is possible to have the system of proportional representation in a by-election, then looking to Article 80 of the Constitution and also section 147 of the Representation of the People Act we think that the mode of election should be proportional representation. The learned District Judge has taken the view that if there is one vacancy, then it is not possible to apply the system of proportional representation. We see no difficulty. If there is one vacancy and there are various contestants, there is no reason why the person who gets the largest number of votes amongst the contestants should be elected, although he may only represent the minority of the constituency. It is possible to use the method of the single transferable vote even in the case where there is only one vacancy, provided there are candidates contesting the election, and therefore if an election had been held in this case and if there had been various candidates, there was no reason why the election should not have been held by the system of proportional representation. But the question seems to us to be academic because in fact no election was held and no question arises what was the method by which that election should be held. Of course, it is true that when there is only a by-election for one seat, it is always possible for the majority party to give all its first votes in favour of their own candidate and to that extent the minorities may be prejudiced. But that is an inevitable concomitant of democracy. The majority party must have certain advantages and there is nothing, as we have pointed out, in the Constitution or in the Act or in the rules made under the Act which compels the Election Commissioner to wait till there is more than one vacancy and then to hold a by-election with regard to more than one seat, so that the rights of minorities may be safeguarded.

The final contention urged is that the notification enhancing the date for making nominations did not give sufficient time to everyone living in so far flung a State as the State of Bombay to put in nominations and thereby prejudice was caused and the successful candidate benefited by the shortness of time given by the Election Commissioner. Now, if we look at the dates 11th April, 1957, when the notification was published in the Government Gazette and the last date of filling the nominations, *viz.*, 16th April, 1957, we agree with Mr. Gokhale that the time does not seem to be a reasonable time. But when we look at the provisions of the law we find that the Election Commissioner has no option but to fix the 16th of April as the last date for making nominations. Section 39 of the Act contemplates two notifications. One is the notification calling upon the elected members of the Legislative Assembly to elect a member, and the other is the notification which gives the time schedule with regard to the election. The first notification, as already pointed out, was published in the Gazette on the 6th April, 1957, and under section 39(a) the last date for making nominations shall be the tenth day after the date of publication of the first-mentioned notification or, if that day is a public holiday, the next succeeding day which is not a public holiday. Therefore, the Election Commissioner has no option but to fix the tenth day after the publication of the first mentioned notification as the last date for making nominations, and on the fact of this case that date was the 16th April, 1957. We must, however, point out that when the first notification appeared in the Gazette on the 6th April, 1957, anyone reading the notification and knowing the law—and everyone is presumed to know the law—would have known that the 16th of April, 1957, would be the last date for making nominations. Therefore, the people had ten days' time in which to make nominations. But whatever our view may be as to the reasonableness or otherwise of the time fixed, if that is the legal provision and if the Election Commissioner was bound by it, nothing more remains to be said on this contention.

The result therefore is that the appeal must fail and is dismissed with costs.

By order of the Court,

U. S. HATTANGADI,

Deputy Registrar.

[No. 82/CS(1)/478/57.]

By Order,

A. KRISHNASWAMY AIYANGAR, Secy.

